KASTURI KESVEREN BALASAMY v. RUI DEVELOPMENT SDN BHD

HIGH COURT MALAYA, IPOH
SM KOMATHY JC
[BANKRUPTCY APPEAL NO: 29NCC-620-11-2013]
31 MARCH 2015
[2015] CLJ JT(6)

BANKRUPTCY: *Notice – Setting aside – Application to set aside bankruptcy notice and creditor's petition – Leave to commence bankruptcy proceedings – Failure to comply with r. 91(4) of Bankruptcy Rules 1969 – Whether High Court should follow decision in Kumpolan Kemajuan Raya Sdn Bhd v. Faidz Darus for leave to be granted by court that pronounced judgment against judgment debtor – Whether subordinate courts had jurisdiction in bankruptcy matters – Bankruptcy Act 1967, s. 88*

BANKRUPTCY: *Notice – Leave to issue – Leave obtained from subordinate court that pronounced judgment against judgment debtor – Failure by judgment creditor to obtain leave from High Court – Whether irregularity curable under s. 131 of Bankruptcy Act 1967*

STATUTORY INTERPRETATION: *Construction of statutes – Purposive interpretation – Whether r. 91(4) of the Bankruptcy Rules 1969 should be given purposive interpretation – Whether 'court' should be read to include subordinate courts – Interpretation Acts 1948 and 1967, s. 17A*

In 2010, the respondent had obtained judgment in the Sessions Court against a legal firm, M/s Kas & Abdul Malik ('the legal firm'). The appellant was the partner of the firm. In 2013, the respondent applied and obtained leave in the Sessions Court under r. 91(4) of the Bankruptcy Rules 1969 ('BR') to commence bankruptcy proceedings against the appellant. In the affidavit in support of the application, it was averred that leave was required as the writ of summons was not served on the appellant. A bankruptcy notice was then issued and served on the appellant *vide* substituted service. Thereafter, a creditor's petition was filed and served against the appellant to declare the appellant a bankrupt. The appellant then applied to set aside the bankruptcy notice and the creditor's petition on the ground that the respondent failed to comply with r. 91(4) of the BR in that leave must be obtained from the High Court and not the subordinate court that pronounced the judgment. It was the appellant's argument that such non-compliance had rendered the bankruptcy proceedings initiated against him null and void. The appellant's application was dismissed by the Registrar on the ground that the Sessions Court had the power under r. 91(4) of the BR and O. 77(4) of the Rules of Court 2012 ('ROC') to grant leave to commence bankruptcy proceedings. In consequence, the appellant appealed against the decision of the Registrar on the same ground and further argued that the Legislature did not intend for

A the word 'court' in r. 91(4) of the BR to include the subordinate courts. On the other hand, the respondent contended that the decision of the High Court in *Kumpolan Kemajuan Raya Sdn Bhd v. Faidz Darus* (*'Kumpolan*'s case') was the authority for the proposition that the judgment creditor must apply for leave in the court that pronounced the judgment. In the alternative, the B respondent argued that (i) r. 91(4) of the BR should be given a purposive interpretation that leave was only required in a case where the partner against whom bankruptcy was to be issued was not aware of the action against the firm; and (ii) failure to obtain leave from the High Court was an irregularity that was curable under s. 131 of the Bankruptcy Act 1967 ('BA'). The C principal issue for determination of the High Court was whether it should apply or decline to follow *Kumpolan's* case.

Held (allowing appeal with no order as to costs):

(1) The Judicial Commissioner in *Kumpolan*'s case had overlooked the fact that O. 77 of the ROC and O. 10 of the Rules of the High Court 1980 D were only applicable in cases where a judgment creditor wished to continue execution proceedings to enforce a judgment against a partner by writ of seizure and sale, garnishee proceedings and committal proceedings. As a bankruptcy proceeding was not an execution proceeding, the provisions in the ROC had no application. (para 19)

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(2) The court respectfully disagreed with the view in *Kumpolan's* case that the court that was competent to hear the application was the court where the judgment was pronounced. If the view was correct, it would render r. 91(4) of the BR redundant and inconsistent with s. 88 of the BA which gave the High Court exclusive jurisdiction in bankruptcy matters. It was F highly unlikely that the Legislature included r. 91(4) of the BR for no purpose. Accordingly, the court competent to hear an application for leave to commence bankruptcy proceedings was the High Court. (para 20)

G **(3)** There was no merit in the respondent's contention for giving r. 91(4) of the BR a wider meaning through a purposive interpretation of the provision. A reading of r. 91(4) of the BR demonstrated that the words used in the provision were clear. Leave was required in all cases unless the partner in question had been served with the summons. If the Legislature had intended to give the provision a wider meaning, it could H have done so by adding the appropriate words. (paras 22 & 25)

(4) Rule 91(4) of the BR expressly required that the judgment creditor obtain leave from the High Court to institute bankruptcy proceedings against a partner of a firm. No amount of consent could confer I jurisdiction where no jurisdiction existed and an order made by a court without jurisdiction was not just an irregularity but a nullity. Therefore, there was no merit in the contention that the failure to comply with r. 91(4) of the BR was an irregularity that was curable under s. 131 of the BA. (paras 27-28)

Case(s) referred to:

AmBank (M) Bhd v. Tan Tem Son & Another Appeal [2013] 3 CLJ 317 FC ***(refd)***
Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***
Krishnadas Achutan Nair & Ors v. Maniyam Samykano [1997] 1 CLJ 636 FC ***(refd)***
Kumpolan Kemajuan Raya Sdn Bhd v. Faidz Darus [1996] 1 BLJ 423 HC ***(refd)***
Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 131, 133
Bankruptcy Rules 1969, r. 91(4)
Interpretation Acts 1948 and 1967, ss. 17, 17A
Rules of Court 2012, O. 77(4)
Rules of the High Court 1980, O. 10

For the respondent - Toh Chia Hua; M/s Azman Davidson & Co
For the appellant - In person

Reported by Lyana Shohaimay

JUDGMENT

SM Komathy JC:

[1] This appeal raises the issue of which is the correct forum to grant leave to a judgment creditor to commence bankruptcy proceedings under r. 91(4) of the Bankruptcy Rules 1969 ("Bankruptcy Rules"), against a partner of a firm. The Registrar of the High Court held that the right forum to grant leave is the court which pronounced the judgment. The appellant argues otherwise.

The Facts

[2] The respondent obtained judgment in the Sessions Court Ipoh against the legal firm, Messrs Kas & Abdul Malik on 13 August 2010, for RM77,569 and costs. The appellant and one Abdul Malik bin Mat Judi were the two partners of the said firm. On 23 September 2013, the respondent applied and obtained leave in the Sessions Court under r. 91(4) of the Bankruptcy Rules for leave to commence bankruptcy proceedings against the appellant . It was averred in the affidavit in support that leave was required as the writ of summons had not been served on the appellant. The bankruptcy notice was then issued and served on the appellant by substituted service. Thereafter, the respondent as petitioning creditor filed and served the creditors petition to declare the appellant a bankrupt. The appellant offered to settle the judgment debt in instalments but the respondent did not agree to the terms proposed by him.

[3] On 5 November 2014, the appellant applied to set aside the bankruptcy notice and the creditors petition on the ground that there was non compliance with the r. 91(4) of the Bankruptcy Rules in that leave that is

required must be obtained from the High Court and not the court that pronounced the judgment. The appellant argued that non-compliance with this mandatory provision rendered the bankruptcy proceedings initiated against him null and void.

[4] The Registrar dismissed the application on the ground that the Sessions Court had the power under r. 91(4) and O. 77(4) of the Rules of Court 2012, to grant leave to commence bankruptcy proceedings.

Submissions On Appeal

[5] Before me the appellant canvassed the same arguments adopted before the Registrar, *to wit*, the subordinate courts had no jurisdiction in bankruptcy matters and that the Legislature did not intend that the word "court" in r. 91(4) of the Bankruptcy Rules to include the subordinate courts.

[6] In reply, the respondent contended that the point was misconceived and without any legal basis based on the decision of the High Court in *Kumpolan Kemajuan Raya Sdn Bhd v. Faidz Darus* [1996] 1 BLJ 423; [1996] 5 MLJ 35, KL Rekhraj JC (as he then was). That decision is authority for the proposition that the judgment creditor must apply for leave in the court that pronounced the judgment.

[7] In the alternative, the respondent contended that if he was wrong in his primary submission that the Sessions Court had jurisdiction to grant leave, r. 91(4) should be given a purposive interpretation and should be construed to mean that leave is only required in a case where the partner against whom bankruptcy is to be issued was not aware of the action against the firm. It was contended that this scenario could arise in a case where a particular firm has branches in different states and the partners in one state are not aware of an action brought against the firm. In the present case, the appellant at all material times was aware of the civil action brought against the firm as he had applied to set aside the default judgment that the respondent had initially obtained against the firm.

[8] In the further alternative, the respondent took the position that if his alternative submission was not accepted, then the failure to obtain the leave from the High Court was an irregularity that was curable under s. 133 of the Bankruptcy Act.

[9] In response, the appellant contended that the decision in *Kumpolan Kemajuan Raya (supra)* was wrong and should not be followed as it was made in ignorance of r. 3 of the Bankruptcy Rules and s. 88 of the Bankruptcy Act 1967. By virtue of r. 3 and s. 88, it is only the High Court that has jurisdiction to grant leave to a judgment creditor to commence bankruptcy proceedings under r. 91(4).

The Issue

[10] The principal issue which falls to be determined is whether the court should apply or decline to follow *Kumpolan Kemajuan Raya Sdn Bhd v. Faidz Darus*. The appellant accepts that if he fails on this principal issue, the appeal must be dismissed.

The Statutory Provisions

[11] Section 88 of the Bankruptcy Act provides:

> The High Court shall be the court having jurisdiction in bankruptcy under this Act

[12] Rule 3 of the Bankruptcy Rules provides:

> In these Rules, unless the context or subject matter otherwise requires:
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> "Court" includes a Registrar when exercising the powers of the Court pursuant to the Act or these Rules;

[13] Rule 91 of the Bankruptcy Rules reads in so far as material:

> (1) A bankruptcy notice shall be issued by the Court in which a bankruptcy petition against the debtor may subsequently be filed.
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> ...
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> (4) *In the case of a final judgment or final order against a partnership and if the individual partners were not served with the writ of summons in the suit in which the final judgment or final order was obtained, the final judgment or final order cannot be used to found a bankruptcy notice against a partner without leave of the Court*.
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> (emphasis added)

[14] Order 77 r. 5(4) of the Rules of Court 2012 provides:

> Where a party who has obtained a judgment or an order against a firm claims that a person is liable to satisfy the judgment or order as being a member of the firm, and the foregoing provisions of this rule do not apply in relation to that person, that party may apply to the Court for leave to issue execution against that person, the application to be made by notice of application which must be served personally on that person.

[15] Pursuant to O. 77(4), a judgment creditor may levy execution against a partner of a firm only with the leave of the court. Leave to issue execution is not required in a case where the judgment creditor can satisfy the conditions in sub-r. (2) and (3). It is clear from O. 77(4) that it is only applicable to an execution proceeding to enforce a judgment.

[16] The question that arises is whether a bankruptcy proceeding is an execution proceeding. This question was addressed by the Federal Court in *AmBank (M) Bhd v. Tan Tem Son & Another Appeal* [2013] 3 CLJ 317; [2013] 3 MLJ 179, Ahmad Maarop FCJ in delivering the judgment of the court held at pp. 353-354 (CLJ); p. 209 (MLJ):

> It is clear from the aforesaid judgment that a bankruptcy proceeding is not a writ of execution within the meaning of O. 46 r. 2 RHC 1980, and that unlike execution which is the continuation of the existing proceeding to enforce a judgment provided by RHC 1980, bankruptcy proceedings are provided by separate law and rules, the focus being the judgment debtor, not the debt and the object is to appoint a receiver in the person of the official assignee over the assets of the debtor and to convert the status of the debtor into a bankrupt with certain disqualification and disabilities, the most important being the loss of control over his properties to the official assignee. Unlike an execution proceeding, a bankruptcy proceeding bears the characteristics of a fresh proceeding. Thus a bankruptcy proceeding is an action caught by the provision under s. 6(3) of the Limitation Act 1953. It is an action upon a judgment, ie, an action to enforce a judgment. Such being the case O. 46 r. 2 of the RHC does not apply. Since a bankruptcy proceeding is an action upon a judgment within the meaning of s. 6(3) of the Limitation Act 1953, and limitation for bringing the action is 12 years, a judgment creditor is entitled to enforce a final judgment by instituting bankruptcy proceeding without the leave of the court within that period of 12 years. In other words, if the judgment creditor institutes a bankruptcy proceeding (to enforce a final judgment) within that 12 year period, he 'shall be deemed to be a creditor who has obtained a final judgment or final order' within the meaning of s. 3(1)(i) of the BA 1967. Further, in our view, since O. 46 r. 2 of RHC does not apply to bankruptcy proceeding, there is no reason or justification to use it to read into the phrase, 'execution thereon not having been stayed' in s. 3(1)(i) of the BA 1967, the implication that in addition to there being no stay of execution by the court, the creditor must be in a position to issue immediate execution. The only bar for the institution of bankruptcy proceeding is the limitation under s. 6(3) of the Limitation Act 1953.

[17] The decision in *AmBank (M) Bhd (formerly known as AmFinance Bhd)* illustrates that a bankruptcy proceeding is not an execution proceeding. It is an action upon a judgment ie, an action to enforce a judgment and consequently the provisions in the Rules of Court have no application.

Discussion And Decision

[18] It is apposite at this juncture to examine the case of *Kumpolan Kemajuan Raya Sdn Bhd v. Faidz Darus*, where a judgment creditor obtained judgment against a firm in the Sessions Court. An application was then made in the High Court by originating summons under r. 91(4) of the Bankruptcy Rules for leave to institute bankruptcy proceedings against the individual

partners of the firm. An issue arose as to whether the High Court had jurisdiction to grant the leave. In dismissing the application, the court explained (at [38]):

> The point for consideration was whether this originating summons was properly made to the High Court, or should such an application be made to the very court where the judgment was given against the firm; as O. 10 r. 5(4) and (5) of the Subordinate Courts Rules 1980 ('the SCR') makes a similar provision as that set out under O. 77 r. 5(4) and (5) of the RHC.
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> The plaintiffs' solicitors submitted that as the intended execution proceedings are by way of bankruptcy proceedings, which can only be filed in the High Court, such leave as envisaged under r. 91(4) of the Bankruptcy Rules 1969 can only be obtained from the High Court and not from the subordinate court as O. 30 of the SCR only provides three modes of enforcement of judgments, *viz*:
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> (a) writ of seizure and sale;
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> (b) garnishee proceedings;
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> (c) in a case in which r. 5 applies, by an order of committal.
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> This argument/submission was rejected on the ground that the judgment being that of the sessions court obtained under the SCR which has a specific provision under O. 10 r. 5 sub-rr (4) and (5) which parallels the provision in O. 77 r. 5 sub-rr (4) and (5) of the RHC and each rule defining the Court as the sessions court or the High Court respectively, thus the court would have to be the court under that very rule. Further the judgment taken against the firm though final on the record, was open to challenge on an application for leave to execute against the partners - in that the individual partner had a right under O. 10 r. 5 sub-r (5) to challenge the liability and if he did, the court might order that the liability of that person be tried and determined before such leave could be granted, and this certainly could only be effectively done in the very forum where the judgment was pronounced and where the relevant cause papers were presently kept, and not in the High Court.
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> Thus the application for leave in the High Court was refused and the originating summons was dismissed with liberty to the plaintiffs to file such application in the sessions court.

[19] It would appear that Rekhraj JC had concluded that the subordinate court had jurisdiction based on O. 77 and O. 10 in the Rules of High Court 1980. In my judgment, His Lordship had overlooked the fact that O. 77 and O. 10 are only applicable in a case where a judgment creditor wishes to commence execution proceedings to enforce a judgment against a partner by writ of seizure and sale, garnishee proceedings and committal proceedings. As a bankruptcy proceeding is not an execution proceeding, the provisions in the Rules of Court have no application.

[20] I must therefore respectfully disagree with the view taken by Rekhraj JC that the court competent to hear the application is the court where the judgment was pronounced. This view, if correct, would render r. 91(4) redundant and inconsistent with s. 88 of the Bankruptcy Act that gives the High Court exclusive jurisdiction in bankruptcy matters. There is a presumption that Parliament does not legislate in vain. It is therefore highly unlikely that the Legislature included r. 91(4) in the Bankruptcy Rules for no purpose. Accordingly, in my judgment, the court competent to hear an application for leave to commence bankruptcy proceedings is the High Court.

[21] In *Krishnadas Achutan Nair & Ors v. Maniyam Samykano* [1997] 1 CLJ 636; [1997] 1 MLJ 94, the Federal Court observed:

> The function of a court when construing an Act of Parliament is to interpret the statute in order to ascertain Legislative intent primarily by reference to the words appearing in the particular enactment. *Prima facie*, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant. It must be borne in mind that:
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> > As a general rule a court will adopt that construction of a statute which will give some effect to all of the words which it contains, per Gibbs J in *Beckwith v. R* [1976] 12 All ER 333, at p 337.

[22] I now turn to the alternative argument of the respondent that if the appellant is correct in his interpretation of r. 91(4) of the Bankruptcy Rules that it is only the High Court that is empowered to grant leave, then the phrase "if the individual partners were not served with the writ of summons in the suit in which the final judgment or final order was obtained" in said provision should be accorded a wider meaning adopting the purposive approach. A purposive interpretation would yield the meaning that under r. 91(4), leave is only required if a partner is not aware of the proceedings brought against the firm.

[23] Section 17 of the 17A of the Interpretation Acts 1948 and 1967 ("Interpretation Act") provides:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[24] The underlying rationale of the purposive approach to interpretation is to have the courts construe statutory provisions, as far as it is reasonably possible to do so, in a manner that enables the statutory provision to work efficaciously having regards to its purpose. In *Palm Oil Research and*

Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265; [2005] 3 MLJ 97, Gopal Sri Ram FCJ explained the purposive approach as follows:

> When construing a taxing or other statute, the sole function of the court is to discover the true intention of Parliament. In that process the court is under a duty to adopt an approach that produces neither injustice nor absurdity, ie, an approach that promotes the purpose or object underlying the particular statute albeit that such purpose or object is not expressly set out therein.

[25] A reading of r. 91(4) of the Bankruptcy Rules demonstrates that the words used in the provision are clear. Leave is required in all cases unless the partner in question has been served with the summons. If the Legislature had intended to give the provision a wider meaning, it could have been done so by adding the appropriate words. In the circumstance, I find no merit in the respondent's contention for giving the provision a wider meaning.

[26] Lastly, I turn to the respondent's submission based on s. 131 of the Bankruptcy Act. Section 131 reads:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

[27] The respondent contended that even if the court did not agree with both its primary and alternative submissions, the fact that it had obtained leave from the Sessions Court instead of the High Court was a mere irregularity and did not invalidate the present bankruptcy proceedings. With respect, I am unable to agree with this proposition. A judgment creditor must obtain leave from the High Court to institute bankruptcy proceedings against a partner of a firm. This is an express statutory requirement laid under r. 91(4) of the Bankruptcy Rules. In *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393, the court had to consider what would be the effect of an order made in contravention of an express statutory provision. It was held:

> There are several authorities that deal with the validity of orders made in excess of jurisdiction by a court of unlimited jurisdiction and I find it sufficient to refer to two of them. The first is the decision of the Privy Council in *Meenakshi Naidoo v. Subramaniya Sastri* LR 14 IA 160 which concerned a case where the High Court at Madras purported to entertain an appeal against the decision of a District Judge which was not appealable. At the hearing before the High Court, neither the parties nor the court raised the question of jurisdiction. The High Court then reversed the District Judge. On appeal to the Privy Council, it was held that consent or waiver could not cure the absence of jurisdiction. Sir Richard Baggallay, when delivering the advice of the Board said (at p. 166):

> It has been suggested, and it is not right altogether to pass that suggestion over, that, by reason of the course pursued by the present appellants in the High Court, they have waived the right which they might otherwise have had to raise the question of want of jurisdiction. But this view appears to their Lordships to be untenable. No amount of consent under such circumstances could confer jurisdiction where no jurisdiction exists. Upon this point, it may be convenient to refer to the judgment of their Lordships delivered by Lord Watson in the comparatively recent case of *Ledgard v. Bull* LR 13 IA 144, as it in very concise terms deals with the circumstances under which there can be a waiver of a right to complain of a want of jurisdiction. Their Lordships say: 'The defendant pleads that there was no jurisdiction in respect that the suit was instituted before a court incompetent to entertain it; and that the order of transference was also incompetently made. The District Judge was perfectly competent to entertain and try the suit if it were competently brought; and their Lordships do not doubt that in such a case a defendant may be barred by his own conduct from objecting to irregularities in the institution of the suit. When the judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process, although they may constitute the judge their arbitrator, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit.'
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> In the present case, there was an inherent incompetency in the High Court to deal with the question brought before it, and no consent could have conferred upon the High Court that jurisdiction which it never possessed.

[28] It is clear from the above passage that no amount of consent can confer jurisdiction where no jurisdiction exists and that an order made by a court without jurisdiction is not just an irregularity but a nullity. I therefore find no merit in the contention that the failure to comply with r. 91(4) of the Bankruptcy Rules is an irregularity that was curable under s. 131 of the Bankruptcy Act.

Conclusion

[29] In conclusion, I therefore hold that the Registrar had interpreted r. 91(4) of the Bankruptcy Rules incorrectly and was wrong in dismissing the application made by the appellant to set aside the bankruptcy notice. Accordingly, the appeal is allowed with no order as to costs.